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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1169

UBURBAN TILE CENTER, INC., A CORPORATION, AND UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners,

vs.

OCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, ROCKFORD, ILLINOIS, WINNEBAGO COUNTY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS—ROCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, CLARENCE DRUGER, GEORGE IBEN, EARL HIRTH, and MARBLE TILE AND TERRAZZO WORKERS, LOCAL NO. 31 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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This brief in opposition is submitted on behalf of Rockford Building and Construction Trades Council, AFL-CIO ("Building Trades Council"); Clarence Druger, individually and as President of the Building Trades Council; George Iben, individually and as Vice-President of the Building Trades Council; Earl Hirth, individually and as

Recording Secretary of the Building Trades Council; and Marble, Tile and Terrazzo Workers, Local No. 31. The United Brotherhood of Carpenters and Joiners of America, Local No. 792, Building Contractors Association of Rockford, Inc., and Suarez Brothers Construction Co., Inc. ("Suarez") were also defendants below and are represented by other counsel.

QUESTION FOR REVIEW.

Does the judicial enforcement of an agreement entered into pursuant to the Construction Industry Proviso of Section 8(e) of the National Labor Relations Act, as amended [29 U. S. C. § 151, et seq.], constitute an unlawful restraint of trade or commerce?[1]

STATEMENT OF THE CASE.

Petitioners are a tile company and a labor organization. Their amended complaint was dismissed by the United States District Court for the Northern District of Illinois and the dismissal was upheld by the Court of Appeals for the Seventh Circuit. The complaint, as amended, alleges,

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1. Section 8(e) of the Labor-Management Relations Act, 1947, as amended (29 U. S. C. 158(e)), in pertinent part, provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an

in substance, that a general contractor (Suarez) and a group of affiliated local unions (Building Trades Council) agreed that only subcontractors having collective bargaining agreements with local unions affiliated with the Building Trades Council would be engaged to perform work at a project which came to be called the Presidential Courts Apartment. Suarez contracted for the installation of tile with Suburban Tile Center, Inc. ("Suburban"), a contractor which did not have a collective bargaining agreement with the appropriate craft union affiliated with the Building Trades Council. In an effort to enforce its agreement with Suarez, the Building Trades Council sought (App., p. 40) and obtained (App., p. 59) an injunction enjoining Suarez from continued violation of the agreement. Suarez directed Suburban to stop installing tile at the project in question the day following the issuance of the court order (App., p. 39). Petitioners then brought this action for injunctive relief and to recover damages for injury arising out of the foregoing circumstances, alleging a violation of the anti-trust laws and a violation of Section 303 of the National Labor Relations Act, as amended, [29 U. S. C. § 187].

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employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . .

ARGUMENT.

Petitioners have asserted three reasons why this Court should review the decision of the Court of Appeals for the Seventh Circuit. None of the reasons given warrants the issuance of the writ sought. We submit, in opposition to their contentions, that:

The decision below has no importance beyond the confines of the case, and was based on now well-settled concepts;

The decision is not inconsistent with the holding of any other Court of Appeals; and

The decision is in accord with this Court's holding in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L., et al.*, v. *N. L. R. B.*, 357 U. S. 93 (1958).

The complaint, as amended, alleged that plaintiffs were injured by reason of the judicial enforcement of a lawful agreement lawfully obtained. Congress, in enacting Section 8(e) of the National Labor Relations Act, as amended [29 U. S. C. § 158(e)], recognized that the peculiarities of the construction industry justify an exception to the basic rule forbidding an employer from agreeing with a labor union not to do business with another person. The exception, commonly called the "Construction Industry Proviso", permits a restrictive agreement with respect to certain work performed at construction sites. The Building Trades Council entered into such an agreement with Suarez which pertained to a particular construction project described as "the site of construction of Apartment Building project, west of Machesny Airport, Rockford, Illinois" (App., p. 54) and later entered into a second agreement of similar

import which was extended to apply to all Suarez construction projects within the jurisdiction of the parties (App., p. 56).

Having successfully negotiated an agreement which could have no effect other than to enhance the employment opportunities of members of its affiliated local unions (as opposed to the employment of members of other unions), the complaint alleged that the Building Trades Council, after first demanding compliance by letter (App., p. 48), instituted proceedings in the Circuit Court of Winnebago County to prohibit Suarez from violating that agreement (App., p. 40).

The well-settled concepts upon which the decision below was based are:

> The legality of the agreement.
> The legality of the manner in which it was obtained.
> The legality of the manner in which it was enforced.

The Construction Industry Proviso is a complete answer to the legality of the agreement. The origin of Petitioner's misconception concerning the effect of Section 8(e) [29 U. S. C. 158(e)] may be found in Paragraph 19 of the Second Cause of Action of their Complaint (App., pp. 29-30) where they purported to set forth Section 8(e) in its entirety, but failed to include that part of the Statute which is fatal to their claim of a violation and which renders lawful the very activity of which they complain.

The Court of Appeals correctly dealt with the second element, concerning the manner in which the agreement was obtained, by succinctly stating, "economic action to secure such agreements has been allowed (citing cases)". [354 F. 2d 1, 3]. Even Petitioners do not contend that concerted economic activity may not be utilized to obtain the kind of agreement involved in this case. The means used to obtain the agreement is clearly not in issue.

The answer to the third element, relative to enforcement of the agreement, also disposes of Petitioners' contention that the Court of Appeals decision is contrary to this Court's holding in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L., et al.*, v. *N. L. R. B.*, 357 U. S. 93 (1958), known as the *Sand Door* case. To the extent here relevant, *Sand Door* simply stands for the proposition that an otherwise lawful agreement cannot be enforced by means prohibited by Section 8(b)(4)(A) of the National Labor Relations Act, as amended [29 U. S. C. § 158(b)(4)(A)]; it does not prohibit judicial enforcement. This Court said, at page 108:

> It does not necessarily follow from the fact that unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited by § 8(b)(4)(A).

The judicial enforcement of an 8(e) contract clause is not prohibited by *Sand Door* and was specifically contemplated by Congress. Senator Goldwater, in explaining the 1959 amendments to the Labor-Management Relations Act, said:

> Thus, although employees and unions who are under this [8(e)] exemption may lawfully enter into such agreements, and *may resort to the courts for their enforcement under applicable principles of contract law,* no coercion or restraint—economic or otherwise—may be used by any party . . . (to prevent a breach). 105 Daily Cong. Rec. A8524 (September 14, 1959, remarks of Senator Goldwater); 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1858. (Emphasis added.)

The remarks of Senator Kennedy confirm this interpretation:

> It . . . [Section 8(e)] . . . is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. 105 Daily Cong. Rec. 16415 (September 3, 1959, remarks of Senator Kennedy); 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1433.

The contention that the decision below is in conflict with *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, 342 F. 2d 18 (2d Cir., 1959), is without basis. The issue presented by the instant case involves *judicial* enforcement. *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, dealt with enforcement of a contract provision by *economic coercion* forbidden by Section 8(b)(4)(A) [29 U. S. C. 158(b)(4)(A)]. Furthermore, the contract provision in *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, attempted to circumvent the "on site" requirement by defining deliveries to the site as coming within that definition. No such factor exists in this case. The agreements here were limited to the airport site, in the first instance, and construction projects, in the second. There is no issue of off site work as Petitioners belatedly suggest. To the contrary, the only dispute involved installation of tile at the apartment project and not the manufacture nor delivery of the tile in question.

CONCLUSION.

We submit that the decision below does not involve a question of federal law which has not been settled by this Court, but to the contrary, that the Court of Appeals determined a rather simple question of well-settled law which is of little significance beyond the case itself. We further submit that the decision below is consistent with the holdings of other Courts of Appeals, including the decision in *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, 342 F. 2d 18 (2d Cir., 1956). Moreover, the decision of the Court of Appeals for the Seventh Circuit, to the extent applicable, is entirely in accord with this Court's decision in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L. et al.* v. *N. L. R. B.*, 357 U. S. 93 (1958).

In view of the foregoing, we respectfully urge that the Petition praying the issuance of a Writ of Certiorari be denied.

Respectfully submitted,

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